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Robert Lee @ Robert Seet & Anor (personal representatives of the estate of Li Keng Liat) v Wong Ah Yah & Anor (beneficiaries and trustees of the estate of Tan Tai Tip)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M–02–568 OF 1996
MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ MOHAMAD JJCA
29 NOVEMBER 2005

C

Land Law — Malay reservations — Dealings in reservation land — Whether sale of restricted customary land to non Malay and non holder of qualifying certificate render sale invalid — Whether property in land pass to purchaser despite illegal sale — Whether policy to restrict ownership extend to compensation money that represent the value of the land — Malacca Lands Customary Rights Ordinance

D

The dispute was between the estate of Li Keng Liat ('the defendants') and the estate of Tan Tai Tip ('the plaintiffs') over the sum of RM616,146 which was awarded by the Collector of Land Revenue as compensation for the acquisition of a Malacca customary land ('the land') registered in the name of Lee Chim Giang as executor of the estate of the Li Keng Liat. The land was sold by Lee Chim Giang to Tan Tai Tip in 1935. Although the land remained registered in the name of Lee Chim Giang as executor of the estate of Li Keng Liat, there was no claim to the land by any beneficiary of Li Keng Liat until the land was acquired in 1982. The acquisition sum was deposited in court. The defendants submitted that the sale was not valid because the land being a customary land could only be sold to a Malay or a holder of a qualifying certificate as required for in the Malacca Lands Customary Rights Ordinance (Cap 125) which Tan Tai Tip was not. The plaintiffs however submitted that Tan Tai Tip was the lawful owner of the land since the property in the land had passed to Tan Tai Tip, who was therefore entitled to exclusive possession even if the contract of sale was illegal. The estate of Tan Tai Tip succeeded in its claim at the High Court, thus this appeal.

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Held, dismissing the appeal:

(1) This was a case of an outright sale of land which the estate of the seller had recognized for 47 years as no longer belonging to it. De facto the land belonged to the estate of Tan Tai Tip and no longer belonged to the estate of Li Keng Liat. Therefore, it was fair and just that the compensation be paid to the estate of Tan Tai Tip. To do otherwise would be to deprive Tan Tai Tip's estate of the continued use and enjoyment of the land that it had paid for and instead to compensate and unjustly enrich Li Keng Liat's estate that had received the price of the land and had practically divested itself of any claim to the land. Deciding the appeal upon those considerations, it was not necessary for the plaintiff to have put his claim to entitlement to the compensation technically on the basis

I

of exclusive possession (instead of bare trustee) and to have sought a declaration of exclusive possession (see para 16).

(2) The policy of the Ordinance that restricted ownership of Malacca customary lands to Malacca Malays and certificated persons was not meant for the benefit of Li Keng Liat's estate. It was meant for the benefit of the Malacca Malay. If Li Keng Liat wanted to sell the land, he must sell it to a Malacca Malay. It was wrong of Lee Chim Giang, his executor-son, to have sold it to Tan Tai Tip. But sell it he did, although Tan Tai Tip could not be registered as the owner, because to do so would be contrary to law and the registration would not be valid. But the land having been acquired by the State, the need to uphold the policy ceased to exist (see para 17).

(3) The need to uphold the policy did not extend to the compensation moneys that represent the value of the land. Where the compensation was concerned, the question was solely one whether it should go to Li Keng Liat's estate or to Tan Tai Tip's estate. There was no restriction in favour of the Malacca Malay on the use of the moneys as there was, before the acquisition, on change of ownership of the land that the moneys now, after the acquisition, represent. The policy governing Malacca customary lands was therefore irrelevant to the dispute between the two estates over the compensation (see para 17).

[Bahasa Malaysia summary

Pertikaian adalah antara harta pusaka Li Keng Liat ('defendan-defendan') dan harta pusaka Tan Tai Tip ('plaintif-plaintif') berhubung sejumlah wang RM616,146 yang diawardkan oleh Pemungut Cukai Tanah sebagai pampasan untuk pemerolehan tanah adat Melaka ('tanah tersebut') yang didaftarkan atas nama Lee Chim Giang sebagai pentadir harta pusaka Li Keng Liat. Tanah tersebut telah dijual oleh Lee Chim Giang kepada Tan Tai Tip pada tahun 1935. Meskipun tanah tersebut masih didaftarkan atas nama Lee Chim Giang sebagai pentadbir harta pusaka Li Keng Liat, tiada tuntutan ke atas tanah tersebut oleh mana-mana benefisiari Li Keng Liat sehingga tanah tersebut diperoleh dalam tahun 1982. Jumlah perolehan itu didepositkan di mahkamah. Defendan-defendan berhujah bahawa jualan itu tidak sah kerana tanah tersebut yang merupakan tanah adat hanya boleh dijual kepada seorang berbangsa Melayu atau pemegang sijil yang layak seperti yang diperlukan dalam Ordinan Hak-Hak Tanah Adat Melaka (Bab 125) yang mana Tan Tai Tip bukan. Plaintif-plaintif bagaimanapun berhujah bahawa Tan Tai Tip adalah pemilik sah di sisi undang-undang tanah tersebut memandangkan hartanah dalam tanah tersebut telah diserahkan kepada Tan Tai Tip, yang oleh itu berhak terhadap perolehan eksklusif meskipun kontrak jualan menyalahi undang-undang. Harta pusaka Tan Tai Tip berjaya dalam tuntutannya di Mahkamah Tinggi, oleh itu rayuan ini dibuat.]

Diputuskan, menolak rayuan tersebut:

(1) Ini merupakan satu jualan tanah yang mana harta pusaka penjual yang dikenali selama 47 tahun tidak lagi dimiliki olehnya. Secara de facto tanah tersebut adalah milik kepada harta pusaka Li Keng Liat. Oleh itu, adalah adil agar

pampasan dibayar kepada harta pusaka Tan Tai Tip. Untuk berbuat sebaliknya akan menyekat harta pusaka Tan Tai Tip daripada terus menikmati penggunaan tanah tersebut yang telah dibayar olehnya dan sebaliknya diberi pampasan dan secara tidak adil memberi kelebihan kepada harta pusaka Li Keng Liat yang telah mendapat harga tanah tersebut dan secara praktikal melucutkan dirinya daripada apa-apa tuntutan terhadap tanah tersebut. Dalam memutuskan rayuan berdasarkan pertimbangan berikut, adalah tidak perlu bagi plaintif-plaintif mengemukakan tuntutannya terhadap kelayakan untuk mendapat pampasan secara teknikal berdasarkan perolehan eksklusif (dan bukan berdasarkan pemegang amanah biasa) dan untuk memohon satu deklarasi perolehan eksklusif (lihat perenggan 16).

(2) Polisi Ordinan yang membatas pemilikan tanah adat Melaka kepada Melayu Melaka dan mereka yang mempunyai sijil bukan demi kebaikan harta pusaka Li Keng Liat. Ia bertujuan demi kebaikan Melayu Melaka. Jika Li Keng Liat ingin menjual tanah tersebut, beliau hendaklah menjualnya kepada seorang Melayu Melaka. Adalah salah untuk Lee Chim Giang, anak pentadbir itu, menjualnya kepada Tan Tai Tip. Tetapi itulah yang beliau telah lakukan, walaupun Tan Tai Tip tidak dapat didaftarkan sebagai pemilik, kerana untuk berbuat demikian adalah bertentangan dengan undang-undang dan pendaftaran tidak akan sah. Namun disebabkan tanah tersebut telah diperoleh oleh Kerajaan Negeri, maka keperluan untuk mengekalkan polisi tersebut tidak wujud lagi (lihat perenggan 17).

(3) Keperluan untuk mengekalkan polisi tidak merangkumi memberi pampasan wang yang menggambarkan nilai tanah tersebut. Di mana pampasan adalah berkaitan, persoalannya adalah sama ada ia patut diberikan kepada harta pusaka Li Keng Liat atau harta pusaka Tan Tai Tip. Tiada batasan menyebelahi Melayu Melaka berhubung penggunaan wang kerana sebelum perolehan berlaku, terhadap pertukaran milikan tanah tersebut bahawa wang itu sekarang, selepas perolehan, diberikan. Polisi yang mengawal tanah adat Melaka adalah tidak relevan dengan pertikaian antara kedua-dua harta pusaka berhubung pampasan (lihat perenggan 17).

Notes

For cases on dealings in Malay reservation land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2922–2925.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)

Mustafa bin Osman v Lee Chun & Anor [1996] 2 MLJ 141 (refd)

Ramsden v Dyson (1866) LR 1 HL 129 (refd)

Sajan Singh v Sardara Ali [1960] MLJ 52 (refd)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 (refd)

Tinsley v Milligan [1993] 3 All ER 65 (refd)

Legislation referred to

Malacca Lands Customary Rights Ordinance ss 3, 29

Appeal from: Civil Suit No 22–27 of 1988 (High Court, Melaka)

Andrew Goh Tyau Soon (Andrew TS Goh & Khairil) (Khairil Aznan with him) for the appellants.
Yau Jiok Hua (Yau Jiok Hua) for the second respondent.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] The dispute that gave rise to this appeal was one between the estate of Li Keng Liat @ Lee Keng Liat and the estate of Tan Tai Tip. The subject of the dispute was the sum of RM616,146 which was awarded by the Collector of Land Revenue as compensation for the acquisition by the Stale of Malacca of a Malacca customary land of about seven acres in area, which was registered in the name of Lee Chim Giang as executor of the estate of the said Li Keng Liat, who had died in 1903. The dispute had its source in the fact, which was conceded in the appeal, that in 1935 Lee Chim Giang sold the land to Tan Tai Tip for an unknown sum. The estate of Tan Tai Tip succeeded in its claim in the High Court that it was entitled to that sum. We dismissed the appeal by the estate of Li Keng Liat.

[2] Since the sale, Tan Tai Tip and his relatives had been in quiet and uninterrupted possession of the land, had built dwelling-houses and lived on the land, had paid all quit rent and other dues, had been using the land for the planting of padi and vegetables and the rearing of cattle, and had been in possession of the document of title to the land. Although the land remained registered in the name of Lee Chim Giang as executor of the estate of Li Keng Liat, there was no claim to the land by any beneficiary of Li Keng Liat. In fact, after the death in 1937 of Lee Chim Giang, who was one of the sons of Li Keng Liat, Li Keng Liat's estate was unrepresented until well after the land was acquired in 1982. In short, to all appearances the beneficiaries of the estate of Li Keng Liat had at all times regarded the land as belonging to Tan Tai Tip, that is, until after the land was acquired.

[3] Tan Tai Tip died in 1978 leaving the land as his only property and a will in which he appointed his wife, Wong Ah Yah, and his son, Tan Ngiap Heng, as the executrix and executor and trustees of his will.

[4] The land was acquired by the State in 1982 for housing. At the inquiry to determine compensation, the children of Tan Tai Tip, seven in all, including Tan Ngiap Heng, claimed compensation for the land on the ground that they were beneficially entitled to the land. No one appeared for the estate of Li Keng Liat. There is no evidence that the necessary notices were served on anyone on the side of the estate of Li Keng Liat. The Collector awarded RM616,146 for the land but, because the land was registered in the name of the estate of Li Keng Liat, the Collector did not order the compensation to be paid to the estate of Tan Tai Tip but ordered on 18 March 1982 that it be deposited in court.

[5] Inquiries made on behalf of Wong Ah Yah and Tan Ngiap Heng, who desired to pursue on behalf of the estate of Tan Tai Tip their claim to the compensation,

disclosed that one Lee Joo Eng, daughter of Lee Chim Giang, was the only surviving next of kin of Li Keng Liat On 4 July 1987 the solicitors of Wong Ah Yah and Tan Ngiap Heng wrote to Lee Joo Hng to enquire whether she was prepared to renounce her right to representation of the estate of Li Keng Liat to their clients and her right to any claim in respect of the land. Lee Joo Eng did not respond. Subsequently she applied on 8 April 1988 to be the legal representative of the estate of Li Keng Liat and did become such.

[6] In June 1988, the estate of Tan Tai Tip commenced its action against the estate of Li Keng Liat in the High Court. The estate of Tan Tai Tip was represented by Wong Ah Yah, his widow, and Tan Ngiap Heng, his son, as plaintiffs, and the estate of Li Keng Liat was represented by Lee Joo Eng as defendant. The Collector was included as the second defendant. Wong Ah Yah died on 16 November 1990, leaving Tan Ngiap Heng as the sole plaintiff to pursue the action. He was the second respondent here. Before the trial could properly commence, the defendant Lee Joo Eng died and by order dated 22 September 1994 was replaced by Robert Lee and Jeffrey Lee Cheng Tiam, the appellants here, as defendants in the High Court.

[7] In the trial in the High Court, the plaintiff Tan Ngiap Heng and one of his brothers gave evidence. It is from their evidence that I gathered the facts set out in para 2 above, as to which I said that to all appearances the estate of Li Keng Liat had at all times regarded the land as belonging to Tan Tai Tip. No one gave evidence for the estate of Li Keng Liat, so that there was nothing to disturb or contradict the appearances presented by the evidence of the plaintiffs witnesses.

[8] The ultimate object of the plaintiff's action was to obtain an order to pay the compensation of RM616,146 and the interest thereon to him, but the action was premised on the contention, for which a declaration was sought in para 19(a) of the statement of claim, that Tan Tai Tip was the lawful owner or was beneficially entitled to the land. The defendant counterclaimed for a contrary declaration and orders in favour of the estate of Li Keng Liat.

[9] In submission in the High Court, the plaintiff grounded his claim to entitlement to the declaration that Tan Tai Tip was the lawful owner of the land on the argument that the sale of the land to Tan Tai Tip was a valid sale and that since the contract was fully executed, the estate of Li Keng Liat, on the authority of *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, held the land as registered owner in trust for the estate of Tan Tai Tip. The question of validity of the sale arose because of certain provisions of the Malacca Lands Customary Rights Ordinance (Cap 125). By s 3:

> (1) No transfer of customary land shall be valid unless it is made to an individual qualified to become a customary land-holder.
>
> (2) The following persons shall be deemed to be qualified to become customary landholders:
>
> (a) any Malay domiciled in the State of Malacca; and
>
> (b) any person holding a certificate from the Governor in Council of Malacca that he is qualified to hold customary land.

But Tan Tai Tip was not a Malay or a holder of a qualifying certificate. By s 29, 'No mortgage or sale of any interest in any customary land in Malacca shall be valid unless made in accordance with this Ordinance. There was much argument in the High Court on the question, with the plaintiff contending that despite those provisions the sale was a valid sale and with the defendants contending that by virtue of those provisions the sale was not a valid sale.

[10] Alternatively, the plaintiff argued in the High Court that even if the sale was illegal and void, Tan Tai Tip's estate was entitled to compensation because the contract of sale had been fully executed, the seller had received payment for the land, the property in the land had passed to the buyer and the buyer had been enjoying quiet and uninterrupted possession since. For the alternative argument, the plaintiff relied on the principle in *Sajan Singh v Sardara Ali* [1960] MLJ 52.

[11] At a later stage in the submission, however, the plaintiff realized that, even though the sale might be found to be valid, he might not succeed in getting the declaration sought in para 19(a) of the statement of claim. The plaintiff's realization came about because of the decision of the Federal Court in*Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 which had not existed when the plaintiff submitted in support of the declaration. In that case the Federal Court said, at p 29, last paragraph:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

Since in this case there was no evidence of a duly executed, valid and registrable transfer, the plaintiff felt that he might not be able to succeed in his argument that the estate of Li Keng Liat held the land as a bare trustee for the estate of Tan Tai Tip. So he sought to have the declaration in para 19(a) substituted with the following: 'That at all material time \sic\ inclusive of the date of compulsory acquisition... Tan Tai Tip was entitled to exclusive possession of [the land]'. The learned trial judge allowed the substitution, the defendants not objecting.

[12] So the plaintiff's case was reduced to one of exclusive possession. He relied on *Sajan Singh*, *Tinsley v Milligan* [1993] 3 All ER 65 and *Mustafa bin Osman v Lee Chun & Anor* [1996] 2 MLJ 141. He submitted that according to the principles in those cases the property in the land had passed to Tan Tai Tip, who was therefore entitled to exclusive possession even if the contract of sale was illegal. It was an argument in a similar vein to the alternative argument in para 10 above that the plaintiff had earlier taken up when he was relying on the principal argument that Tan Tai Tip had become the lawful owner of the land.

[13] The learned trial judge, however, after allowing the substitution of the prayer in para 19(a) of the statement of claim, as may be seen at the bottom of p 26 of his judgment, did not decide on the question of exclusive possession, which was the only

question on which, with the substitution, the plaintiffs ease depended, although at pp 29 and 31 he did consider the cases of Tinsley and Mustafa bin Osman. Instead, after stating four matters that he said he had decided, the last being that 'a bare trust could not have been created owing to the non-transfer of the property by valid instruments', a decision presumably based on the Borneo Housing case and a decision which, with the substitution, was no longer necessary, he said, at p 33: The next step will be to dismiss the claim because of the above factors. But something tells me that it is not as easy as that. How am I to behave indifferently to the concept of equity and proprietary estoppel which has a rightful place in Malaysian law?

[14] After considering the question of the application of the rules of equity in Malaysia, and after reciting certain facts which he said at p 42 of the judgment illustrated 'the positive acts of the plaintiffs and the indifferent attitude of the defendants' and certain considerations, including the consideration that 'to leave the plaintiffs in a lurch without the benefits of the rules of equity surely would leave a poor taste in the mouth of everyone concerned over the powcrlessness of the court to mete out and uphold justice', he said that he was convinced of the need to apply the rules of equity, by which he obviously meant proprietary estoppel, and he quoted the following statement by Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129, which Edger Joseph Jr SCJ quoted in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at p 405:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

He then made the amended declaration and orders that the plaintiff sought.

[15] In the appeal, the defendants' submission, in gist, was that were it not for the ground of proprietary estoppel, the learned trial judge would have dismissed the plaintiff's claim, but the judge ought not to have considered proprietary estoppel because it had not been pleaded, had not been raised in submission by the plaintiff, and the defendant had not had a opportunity to submit on it, and even if it could be considered, it could not avail against a statute, in this case the Malacca Lands Customary Rights Ordinance, by which the transfer of the land to Tan Tai Tip would not have been valid. The defendants maintained that even if Tan Tai Tip was entitled to exclusive possession of the land, that could not defeat the right of the registered owner to receive compensation.

[16] The learned trial judge was obviously swayed by the palpable injustice to the estate of Tan Tai Tip if it was to be deprived of the compensation in favour of the estate of Li Keng Liat. In my judgment, he was entitled to resort to any appropriate principle of law to do justice even it the principle had not been considered in submission. It was up to this court to consider whether the principle that the judge relied on is applicable in this case. As to this, I would observe that while the circumstances envisaged by Lord Kingsdown are of a different kind from those in this

case, the circumstances in this case are a great deal more in favour of Tan Tai Tip's estate than the circumstances envisaged by Lord Kingsdown are in favour of his hypothetical man. This is not a mere case of taking possession of land under an expectation of title created by the landlord and laying out money on the land with the passive consent of the landlord. This is a case of an outright sale of land which the estate of the seller had recognized for 47 years as no longer belonging to it and which the buyer and his children had been using and laying out money on as their land. De facto the land belonged to the estate of 1'an Tai Tip and no longer belonged to the estate of Li Keng Liat. Until the question of the compensation arose the estate of Li Keng Liat was not interested in the land. Had the land not been acquired, no doubt if Tan Tai Tip's estate sought to have the land registered in its name, it would not succeed. But on the other hand, if the land had not been acquired, the estate of Li Keng Liat would continue to disregard the land as no longer belonging to it. Or if, relying on its registered title, it sought to deprive the beneficiaries of Tan Tai Tip of the land, the course open to it would be to file an action for vacant possession. But the price of the land having been paid for and money having been invested in it to improve it, even if the estate of Li Keng Liat was to succeed in the action, it would not be without having to pay back the price that had been paid for the land and the value of improvements. Otherwise the estate of Tan Tai Tip would have lost the land that Tan Tai Tip had paid for and had spent money to improve, without getting any compensation. Now that it lost the land, not by the action of the estate of Li Keng Liat but by government action, it is fair and just that the compensation be paid to the estate of Tan Tai Tip. To do otherwise would be to deprive Tan Tai Tip's estate of the continued use and enjoyment of the land that it had paid for and instead to compensate and unjustly enrich Li Keng Liat's estate that had received the price of the land and had practically divested itself of any claim to the land. It was with those considerations in mind, which I hesitate to label as considerations of proprietary estoppel, that I decided that the learned trial judge was right to order that the compensation be paid to the plaintiff and that therefore the appeal of the defendants should be dismissed. Deciding the appeal upon those considerations, it seemed to me that it was not necessary for the plaintiff to have put his claim to entitlement to the compensation technically on the basis of exclusive possession and to have sought a declaration of exclusive possession.

[17] The decision to pay the compensation moneys to Tan Tai Tip's estate might be objected to as recognizing Tan Tai Tip's estate as the rightful owner of the land and ignoring the fact that Li Keng Liat's estate is the registered owner of the land and also as undermining the policy of the Ordinance that restricts ownership of Malacca customary lands to Malacca Malays and certificated persons. That Li Keng Liat's estate remained as the registered owner was solely owing to the fact that, even if the parties had thought of effecting a formal transfer, the land could not have been registered in the name of Tan Tai Tip unless he had a qualifying certificate, which presumably he did not have and did not attempt to obtain. As to undermining the policy of the Ordinance, the answer is this. The policy was not meant for the benefit of Li Keng Liat's estate. It was meant for the benefit of the Malacca Malay. If Li Keng Liat wanted to sell the land, he must sell it to a Malacca Malay. It was wrong of Lee Chim Giang, his executor-son, to have sold it to Tan Tai Tip because that deprived some Malacca Malay of the opportunity of owning the land. Bui sell it he did, although Tan Tai Tip could not be registered as the owner, because to do so would

be contrary to law and the registration would not be valid. But the land having been acquired by the State, the need to uphold the policy ceases to exist. To whom the land was destined to go after it had been developed for housing, whether to Malacca Malays or to others, depended on Slate policy on housing. The need to uphold the policy does not extend to the compensation moneys that represent the value of the land. Where the compensation is concerned, the question is solely one whether it should go to Li Keng Liat's estate or to Tan Tai Tip's estate. The party that wins the compensation is free to spend it. There is no restriction in favour of the Malacca Malay on the use of the moneys as there was, before the acquisition, on change of ownership of the land that the moneys now, after the acquisition, represent. The policy governing Malacca customary lands is therefore irrelevant to the dispute between the two estates over the compensation.

[18] My learned brother, Mokhtar Sidin JCA, who has seen these grounds of judgment when in draft, has expressed his agreement with the draft. As I was only able to commence preparing the draft after my learned brother, Mohd Saari JCA, had gone on retirement, it has not been possible to obtain his response to it.

Appeal dismissed.

Reported by Loo Lai Mee